SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1942

No. 232

H. W. KELLEY, ET AL.,

Petitioners,

vs.

EVERGLADES DRAINAGE DISTRICT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 215), rendered on May 7, 1942, has not yet been reported. A petition for rehearing, filed in said Circuit Court of Appeals on May 26, 1942 (R. 219), was denied June 2, 1942 (R. 224).

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347),

providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Courts of Appeals.

III.

Statement of the Case.

The nature of the case and the decision of the Circuit Court of Appeal for the Fifth Circuit are set forth in the foregoing petition (pp. 1-8), which, in the interest of brevity, is adopted as a part of this brief.

IV.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

1. In affirming the order of the District Court.

2. In sanctioning the exercise of power by the District Court in excess of the limited jurisdiction conferred by the Bankruptcy Act.

3. In failing to pass on the errors assigned and in holding that to reverse the District Court or compel the Petitioner to follow the procedure required by the Act "would put the district and (consenting) creditors to additional, unnecessary and useless expense."

4. In finding that it is not shown that Ranson-Davidson Company attempted to give consent to the Plan of Composition for the bonds owned by the Petitioners herein.

ARGUMENT IN SUPPORT OF PETITION.

Point I.

The decision of the Circuit Court of Appeals is in conflict with the rule announced in Ouerbacker v. Henderson County, 4 Cir., 126 F. 2d 309.

The Circuit Court of Appeals for the Fourth Circuit in *Ouerbacker* v. *Henderson County, supra,* decided Feb. 23, 1942, announced the rule that when timely objection is made because creditors owning not less than 51% in amount of the securities affected by a Plan of Composition had not accepted it in writing when the petition for confirmation was filed, the objection is one of substance, and if a Motion to dismiss the petition is made before acceptances are received, or if the deficiency otherwise comes to the attention of the District Judge, a dismissal of the petition is required.

The facts in the instant case bring it squarely within the rule, in that motions to dismiss were filed September 5, 1941 (R. 126 and 130), before the attempted ratification, on September 19, 1941, of the ineffective acceptance (R. 167), and before the acceptance of Reconstruction Finance Corporation was signed on September 18, 1941 (R. 180), and before the acceptances of other creditors were signed, and if the acceptances of Reconstruction Finance Corporation and the other creditors had been obtained before the motions to dismiss were denied September 29, 1941, they had not been, and were not then, presented, filed, or otherwise called to the attention of the District Court (R. 180 and 181), but were filed October 1, 1941, at the subsequent hearing before the Master (R. 177-187).

Point II.

The decision of the Circuit Court of Appeals countenances an exercise of power by the District Court in excess of the limited jurisdiction conferred by the Bankruptcy Act.

The decision violates the principle that the grant of jurisdiction to the District Court is not general, but is limited

and confined by the terms of the Act. Chapter IX of the Bankruptcy Act confers jurisdiction of a petition filed by a public debtor when, and only when, the accompanying Plan of Composition has been accepted in writing by the owners of not less than 51% in amount of the securities affected. Unless and until the plan has been so accepted, the petition cannot be filed, and if filed before having been so accepted, the only jurisdiction the Court can exercise is to dismiss it as soon as the facts become known.

Section 83(a) of the Bankruptcy Act requires that:

> "The Petition shall state that a plan of composition has been prepared, is filed and submitted with the petition, and that creditors of the petitioner owning not less than 51 per centum in amount of the securities affected by the plan (excluding, however, any such securities owned, held, or controlled by the petitioner), have accepted it in writing."

Clearly the intent of the Congress was that advance acceptance in writing by the owners of not less than 51% in amount of the securities affected was a prerequisite to the right of the taxing agency to file its petition at all. 10 Remington on Bankruptcy 241, Sec. 4348. Annotation, 79 L. Ed. 1133, 1170, 1183.

This prerequisite is unquestionably jurisdictional, the intent being that a Public Debtor shall not be permitted to invoke the jurisdiction of the District Court, and that the latter shall not have jurisdiction to entertain the proceedings, unless the Plan of Composition has been accepted by the owners of the requisite percentage of securities affected. In 81 Cong. Rec., June 24, 1937, at page 8210, speaking for H. R. 5969, just prior to its adoption by the

House, Mr. Wilcox, one of the authors of the Bill, used the following significant language:

> "The municipality cannot go into Court until it has gotten 51 percent of its debt to agree to the settlement. It then submits the entire plan to the Federal District Judge, * * *."

At page 8213, in this same debate, it was said:

> "In the first place, a composition which may be later presented to the Court must initiate with the creditors themselves. Before the creditors can go to Court and invoke the relief provided under this bill, 51 percent of them must have agreed upon a Plan of Composition. After a plan has been agreed upon by 51 percent of the creditors, a petition may be filed in voluntary bankruptcy by the agency which is unable to pay its debts in the ordinary course. * * *"

In the report of the Committee on the Judiciary of the House of Representatives (H. Rep. No. 517, 75th Cong., 1st Sess.), which was adopted by the Senate Committee on the Judiciary (Sen. Rep. No. 911, 75th Cong., 1st Sess.), quoted with approval in *United States* v. *Bekins*, 304 U. S. 27, 50, the Committee said:

> "Compositions are approvable only when the districts or agencies file voluntary proceedings in courts of bankruptcy, accompanied by plans approved by 51 percent of all the creditors of the district or agency, and by evidence of good faith. * * *"

In the case of *In Re City of West Palm Beach*, 5 Cir., 96 F. 2d 85, the Petition for Confirmation, like the Petition in the instant case, alleged that the Plan of Composition had been accepted by the holders of 51% in amount of the securities affected, but the allegations were adjudged to be untrue. For that reason, the District Court dis-

missed the Petition, which ruling was affirmed by the Circuit Court of Appeals.

It is submitted that the question of the jurisdiction of the subject matter of municipal composition proceedings conferred on District Courts by Chapter IX of the Bankruptcy Act, is an important question of Federal Law, which has not been, but should be, decided by the Supreme Court.

POINT III.

The decision of the Circuit Court of Appeals by giving as its rationale that to reverse the District Court "would result in much delay, and would put the District and the creditors to additional, unnecessary, and useless expense", is a premature pronouncement that the Plan of Composition complies with the requirements of the Act (other than the deficiency of initial acceptances) and is so far afield from the usual and accepted course of judicial procedure as to call for the exercise of the Supreme Court's power of supervision.

The Circuit Court of Appeals in affirming the Order of the District Court denying the Motions to Dismiss, treats the failure of Petitioner below to first acquire and submit with its Petition for confirmation the requisite number of consents as "alleged technical defects in and about the filing of the Petition" and observes that "no good purpose could be served by reversing the cause * * *" and that "such procedure would result in much delay, and would put the District and the creditors to additional, unnecessary, and useless expense." (R. 217.) It thereby sanctions a departure from the fundamental rule that jurisdiction of the Federal Court must be determined by the situation as it existed at the time the action was filed. Mr. Chief Justice Marshall, speaking for the Court in *Conolly* v. *Taylor*, 2 Pet. 565, said:

> "They (Defendants) contend that jurisdiction depends on the state of the parties at the commencement of the suit, and that no subsequent change can give or take it away. They say that if an alien becomes a citizen pending the suit, the jurisdiction which was once vested is not divested by this circumstance. So, if a citizen sue a citizen of the same State, he cannot give jurisdiction by removing himself and becoming a citizen of a different State."
> "This is true * * *."

The reasoning of the decision of the Circuit Court of Appeals overlooks the fact that Petitioners are not chargeable with laches and have gone to great trouble and expense to perfect and present their Appeal, and they should not be denied their remedy merely because the District Court, during the pendency of the Appeal, proceeded to render a void decree.

Such reasoning is contrary to applicable decisions of this Court. In *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, to a rule entered in the bankruptcy court, requiring an adverse claimant in possession of a fund to pay it to the trustee in bankruptcy, the claimant tendered a formal response, denying the bankruptcy court's jurisdiction, which the Court refused to entertain. The claimant then participated in the hearing on the merits. The bankruptcy court sustained its jurisdiction upon the ground that, by his acquiescence in the mode of procedure, he assented to its jurisdiction. Upon petition for review the Circuit Court of Appeals reversed the bankruptcy court, and the Supreme Court, upon certiorari, affirmed the Circuit Court of Appeals, saying:

> "The question is whether the district court had jurisdiction to finally adjudicate the merits of this proceeding * * *.
> "In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that

sense the Court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it can go no farther. And where * * * the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review."

Point IV.

The decision of the Circuit Court of Appeals imposes on Petitioners the burden of expending a further sum of approximately $5,000.00 to appeal from an Interlocutory Decree which the District Court was without power to render.

The decision of the Circuit Court of Appeals is based largely, if not entirely, on the acceptances obtained after the making of the Motions to Dismiss and on the Interlocutory Decree rendered by the District Court during the pendency of the appeal taken by Petitioners herein. It assumes, without the record of the proceedings before it, that the Interlocutory Decree is without error, and imposes on Petitioners the burden of expending a further sum of approximately $5,000.00 to appeal from an Interlocutory Decree which the District Court was without power to render.

Respectfully submitted,

Miller Walton,
Attorney for Petitioners.